(36)

No. 1285

# In the Supreme Court of the United States

OCTOBER TERM, 1944

ABRAHAM W. FOURNACE, PETITIONER

*v.*

CHESTER BOWLES, PRICE ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 66–70) is reported at 148 F. (2d) 97.

### JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 15, 1945 (R. 71) and petitioner's petition for rehearing in that court was denied April 17, 1945 (R. 73). The petition for a writ of certiorari was filed May 17, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price

Control Act of 1942, c. 26, 56 Stat. 23 (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. § 347).

## QUESTION PRESENTED

Whether the Emergency Court of Appeals erred in dismissing petitioner's complaint upon finding that the admitted allegations of the complaint together with petitioner's offer of proof did not set forth facts sufficient to establish the invalidity of the regulations fixing the maximum prices for sales of used mechanical refrigerators, used vacuum cleaners, and used washing machines.

## STATUTES, REGULATIONS, AND RULE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and the Rules of Court of the United States Emergency Court of Appeals appear in the Appendix, *infra,* pp. The maximum price regulations involved in this proceeding (Revised Maximum Price Regulation 139, Maximum Price Regulation 294, and Maximum Price Regulation 372) are printed in the Federal Register (8 F. R. 139, 3706, 5533) and are also being submitted herwith. The pertinent provision of the General Maximum Price Regulation containing a definition which is adopted by reference in Maximum Price Regulation 294 appears in the Appendix, *infra,* pp. ——.

STATEMENT

Regulations establishing maximum prices for used household appliances, such as mechanical refrigerators, vacuum cleaners, and washing machines, were issued in recognition of the curtailment of production of new appliances and the inflationary pressures on the short supply of used ones. Revised Maximum Price Regulation No. 139 establishes maximum prices for sales of used mechanical refrigerators by setting forth dollar and cents prices in tabular form for a great number of refrigerators described by make, model, and year. Prices are given "as is" and "reconditioned with a 90 day guaranty". The terms are carefully defined in the regulation. The spread between "as is" price and "reconditioned" price increases with the age of the machine. A seller, in order to obtain the reconditioned price, need not actually perform reconditioning operations if the machine meets certain performance and condition standards.

Maximum Price Regulation No. 294 establishes maximum prices for sales of used vacuum cleaners and likewise contains a dollar and cents price table for a large number of cleaners by make and model. The table specifies both maximum wholesale prices "as is" and maximum retail prices "rebuilt and guaranteed". Provision is made for the retail sale of "as is" machine and wholesale sale of rebuilt machines as a percentage of the

prices set forth in the tables. A substantial differential is provided in favor of retail maximum prices as compared with wholesale maximum prices. The wholesale maximum price applies to the sales to dealers both from consumers and others.

Maximum Price Regulation No. 372 establishes maximum prices for sales of used washing machines and contains price tables for twelve distinctly defined classes of washing machines based on salient functional features such as, type, size, and capacity and the nature of chassis frame, wringer, tub, motor, agitator control, and gears. Maximum prices are specified for each class when sold with guaranties of twelve months or more, with guaranties of six months, and without guaranty to consumers and dealers. Allowances are made for additional features such as mechanical drain pumps and gasoline engines. The regulation provides for substantial differentials in favor of sales to consumers as compared with sales to dealers in maximum prices applicable to sales of used machines which are not guaranteed.

Petitioner, a dealer in used furniture and appliances, was convicted in the United States District Court in August 1944 for overceiling sales of used mechanical refrigerators, used washing machines, and used vacuum cleaners. After conviction, in conformance with the provisions of Section 204 (e) (1) of the Emergency Price Con-

trol Act, as amended, he obtained leave to file a complaint in the United States Emergency Court of Appeals setting forth certain objections to the validity of the regulations establishing maximum prices for the sales of the used appliances involved in the criminal proceedings.

The complaint was filed on September 20, 1944 (R. 1). Its allegations may be grouped into three general grounds of attack against the validity of the regulations: (1) That the regulations are so vague and indefinite as to be unlawful; (2) That the regulations are not reasonably designed to effectuate the purposes of the Act; (3) That the maximum prices fixed by the regulations do not allow an adequate margin for reconditioning and repair and are therefore not generally fair and equitable. Respondent's answer denied many of the allegations of the complaint and challenged the materiality of others (R. pp. 23–33). Thereafter, pursuant to Rule 18 (a) of the Rules of the Emergency Court of Appeals, petitioner filed an application for leave to introduce evidence in support of some of the controverted allegations of the complaint. The application contained an offer of proof, with respect to the evidence sought to be introduced, which set forth the character and form of such evidence and a summary of what such evidence would show if admitted. Respondent thereupon filed objections to the application for leave to introduce evidence, accompanied by

motions to dismiss the complaint or to strike portions thereof and a memorandum in support of the objections (R. pp. 42–64). The motion to dismiss was based on the ground that the admitted allegations of the complaint and the evidence offered in support of the controverted allegations, even if true, were insufficient to establish a right to relief.

The Emergency Court of Appeals on March 15, 1945 rendered judgment dismissing the complaint (R. 71). On March 23, 1945 the opinion was amended to correct certain references to Revised Maximum Price Regulation 139 (R. 72). Thereafter, on March 26, 1945, the petitioner filed a petition for rehearing in which he asked for the first time for leave to amend his offers of proof (R. —). The petition for rehearing was denied on April 17, 1945 (R. 73).

## ARGUMENT

(1) Petitioner's principal contention is that the court below erred in holding that the evidence offered by complainant was insufficient to establish a *prima facie* case in support of the allegations of the complaint that the Regulations were not generally fair and equitable because they did not allow a sufficient margin for costs of reconditioning and repairing. Petitioner suggests that the court unduly restricted the nature of the evidence which might properly be offered in support of this proposition. But the court merely

reiterated its previous holdings to the effect that a showing of increased costs alone is insufficient to establish that maximum prices are not generally fair and equitable (*Philadelphia Coke Co.* v. *Bowles,* 139 F. (2d) 349 (ECA, 1943)); and that in order to establish that such increased costs require an increased price, a complainant must at least present data with respect to his own earnings and evidence "proving that his operations are substantially representative of the industry, and not in its high cost marginal fringe." *Gillespie-Rogers-Pyatt Co., et al.* v. *Bowles,* 144 F. (2d) 361, 367 (ECA, 1944) (R. 69, 70). In suggesting that "the complainant should at least present data with respect to his own earnings," the court gave recognition to the fact that a complainant who represents but one unit in an industry might have difficulty in securing evidence of the earnings of its competitors. The court in effect indicated that a complainant might avoid this difficulty by offering data with respect to his own earnings and showing that his operations were substantially representative of the industry. The petitioner is certainly not in a position to complain of this method of lightening the burden resting upon him to show that the Regulations are not generally fair and equitable.

As the court below pointed out (R. 69–70), petitioner offered no significant evidence either with respect to his own operations under the Regula-

tions or those of the industry generally. The only specific cost data submitted related to twelve appliances which were involved in the criminal proceedings (R. 1–2, 6–8). This data, far from suggesting that the margin between "as is" maximum prices, on the one hand, and maximum prices for the same articles "reconditioned with a guaranty" was insufficient to cover the cost of repair, showed that the difference in almost every case exceeded the alleged cost of reconditioning and repairing (R. 70). Petitioner's own allegations (cf. R. 1–2 with R. 6–8) showed, moreover, that the real source of his difficulty was that he had purchased appliances far above the applicable ceiling prices in violation of the regulations.[1] He is hardly in a position to challenge the regulations for not insuring him a profit on such illegal transactions. The court was therefore clearly right in concluding that petitioner had failed to offer sufficient evidence to establish a *prima facie* case.

Petitioner now suggests that his offer of proof would have established that the Regulations were invalid by showing that "a used goods dealer could not buy under ceiling prices and therefore no profit was possible if he sold at ceiling prices." (Pet. 23). Petitioner is apparently relying here upon his own assertion that the "Regulations do not fix any difference or spread between the

[1] The very first of the allegations in the complaint shows that petitioner purchased for $250 (R. 6) a refrigerator for which the ceiling price was $90.96.

prices at which these commodities may be sold to a retail dealer and the prices at which the retail dealer may sell them to his retail customers." (Pet. 3). This assertion is apparently based in large part upon a misunderstanding of the Regulations. Maximum Price Regulation 294 provides substantial differentials in favor of the retail maximum prices of used vacuum cleaners as compared with wholesale maximum prices (Section 1370.85 Appendix A (c), (d), and (e); the wholesale maximum price applies to the sales to dealers both from consumers and others (Section 1370.79 (a) (8); General Maximum Price Regulation, Section 1499.20 (p)). Similarly, Maximum Price Regulation 372 provides substantial differentials in favor of sales to consumers as compared with sales to dealers in maximum prices applicable to sales of used washing machines which are not guaranteed; the differential is, of course, further increased when the dealer adds his own guarantee to an article which he purchased without a guarantee (Section 3 (d)). Revised Maximum Price Regulation 139 does not expressly provide a differential on the sales of refrigerators to consumers as compared with sales to dealers, but the differential between the "as is" price and the "reconditioned with a 90 day guaranty" price in actual practice tends to preserve the dealer's differential, particularly since the latter price does not necessarily involve reconditioning operations;

the differential may be further increased by a longer guarantee[2] (Section 3 (a), (b), (c), and (d)). Thus all the Regulations involved herein are reasonably calculated to preserve the dealer's margin so long as he does not purchase above the applicable maximum prices.

Petitioner also argues that the Regulations are unreasonable in that "the differences made between the commodities 'as is' and the commodities 'as reconditioned' were only arbitrary differences since they consisted entirely of inflexible price differences that do not bear a direct relation to the costs of repairing and reconditioning and are not specifically based thereon." (Pet. 4.) This contention is obviously without merit, for to have undertaken to provide varying maximum prices depending upon the condition of particular machines or varying allowances depending on the amount actually spent for repair or reconditioning would, aside from the administrative impracticability of the task, have rendered the Regulations wholly unenforceable. Instead, the Administrator, in establishing the difference between "as is" prices and "reconditioned" prices, included as one of the elements an allowance,

[2] Refrigerators with sealed units are given a comparatively small reconstruction allowance, but a separate section provides an allowance for the cost of such units plus a mark-up thereon (RMPR 139, Section 3 (g)).

based on an industry survey,[3] for the average costs of repairing and reconditioning appliances of the type and age involved (R. 69). Furthermore, as the court below observed:

> It must be remembered that the regulation places no compulsion upon a dealer who is about to purchase a used appliance "as is" for reconditioning and resale to pay the maximum prices fixed by the regulation for an "as is" appliance. On the contrary the exercise of the most elementary business judgment requires him to consider the actual condition of the particular appliance, to estimate the cost of reconditioning it, and to determine the price which he is warranted in paying for it in the light of these and other relevant factors including the maximum price for which he will be permitted to sell it after he has reconditioned it.

(2) Petitioner contends that the court below erred in not accepting as true, in passing on the motion to dismiss, the controverted allegations of the complaint as well as the admitted allegations and the offers of proof. In advancing this argument, petitioner ignores the significance of the fact that the motion to dismiss was made after the offer of proof in support of the complaint and

[3] The nature of the survey is set forth in the statements of consideration to the respective regulations. (MPR 294, OPA Service 34:971; MPR 372, OPA Service 34:1121; and the original MPR 139, OPA Service 34:731.

was not directed against the complaint itself. Thus, the motion was comparable to a motion to dismiss at the close of the plaintiff's case under Rule 41 (b) of the Federal Rules of Civil Procedure. The court below therefore properly accepted as true, for the purposes of the motion, the uncontroverted allegations of the complaint and the offers of proof in support of the controverted allegations.

Adoption of the petitioner's view would needlessly prolong proceedings of this type and unduly hamper effective enforcement of the Emergency Price Control Act. General allegations of a complaint, so long as they were sufficient to stand against a demurrer, would require a full trial of the facts, irrespective of an obvious inadequacy of the offers of proof to sustain the controverted allegations of the complaint. Since the evidence is ordinarily presented to the Administrator rather than directly to the court, there would seldom, if ever, be any opportunity for a determination of the sufficiency of complainant's evidence to establish a *prima facie* case until all the evidence on both sides had been presented. Proceedings under section 204 (e) (1) of the Act would become a fruitful source of delay in enforcement proceedings irrespective of the merits of the complainant's cause. Both the specific provisions of section 204 (e) (1) and its legislative history indicate the concern of Con-

gress that the special procedure there provided should not be thus abused.[4]

(3) Finally, petitioner contends that the court erred in failing to grant petitioner an opportunity to amend his application for leave to introduce evidence. While this is a discretionary procedural matter of which this Court will ordinarily not take cognizance, it should be pointed out that no request for permission to amend the application was made prior to the judgment and opinion. Respondent's memorandum in support of his objections and motion contained a recital at length of the deficiencies of petitioner's offer of proof (R. 44–64). Timely request for opportunity to amend could have been made at that stage, yet the only request was made in connection with the petition for rehearing. Furthermore, it should be noted that the court found the deficiencies of petitioner's offers of proof to be in their substance rather than their form; and that

[4] The provision of section 204 (e) (1) requiring that the district court find that the objections are advanced in good faith provides some safeguard against frivolous legal objections. It cannot, however, provide protection against general factual allegations which are largely figments of the imagination. Such protection can be afforded only by early examination in the Emergency Court of Appeals of the complainant's offers of proof. It was presumably for this very purpose that Congress provided for the filing of a complaint with the court rather than a protest with the Administrator. See Sen. Report No. 992, 78th Cong., 2d Sess., pp. 12, 13; Statement by Senator Wagner on Behalf of the Senate Conferees, Cong. Rec. (June 21, 1944), p. 6368.

even in the petition for rehearing, petitioner's suggested offers of proof failed to show specifically how he proposed to supply those deficiencies. In any event, in view of the adequate opportunity to make a proper offer of proof prior to judgment and the need for expeditious disposition of this type of case, it is submitted that there was no error in the refusal of the court to grant the petition for rehearing so as to permit an amendment of the offer of proof.

## CONCLUSION

The decision below is clearly correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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JUNE 1945.